CITY AFFAIRS.

Highly Important Presentment of the Grand Jury of New York—Two of the Aldermen Indicted, &c., &c.

In the Court of Sessions, on Saturday morning, before Recorder Tillou and Aldermen Wesley Smith, of the Eleventh ward, and James M. Bard, of the Fourteenth ward, the Grand Jury announced, through one of the officers, that they were ready to close their business for the term, and wished to be heard. The Recorder sent them word that the Court was ready to receive them. Shortly after, the Grand Inquest appeared, and Mr. Erben, their foreman, presented several bills of indictment to the Court, and then stated that he held in his hand a presentment made by the Grand Inquest, which he requested might be read by the Clerk in open court. The Recorder took the document, cast his eyes over it, and then handed the same to the clerk to read; and as that functionary passed from page to page, great excitement was manifested by the people in court, there being a large number present, anticipating the disclosures that were to be made.

Among the indictments presented to the Court were two bills against the very Aldermen sitting on the bench; and this extraordinary coincidence tended to increase the excitement.

The following is a copy of the document presented by the Grand Jury:—

THE PRESENTMENT.

The Grand Jury, in closing their deliberations for the February term of the Court of General Sessions, respectfully present to the Court the result of their labors. In the charge of the Recorder, at the commencement of the term, the attention of the Grand Jury was called to various public allegations of fraud, corruption, and malpractices, on the part of public officers connected with the city government; and this body was officially charged with the duty of investigating the subject. Having disposed of the cases of persons under confinement charged with crimes, the Grand Jury, at the earliest possible moment, proceeded to the discharge of the duty devolved upon them. From that time they have been daily engaged in the investigation; and, while they regret that the termination of the term of the court prevents a fuller confirmation of their labors, they trust that their exertions, as presented in this report, have not been without beneficial results.

Many witnesses have been summoned, some of whom having been regularly and personally subpœned have neglected to obey the process of the Court; and from the testimony had before the jury, independent of that withheld by the voluntary absence of the witnesses referred to, the moral conviction has been irresistibly forced upon the minds of the Grand Jury, that gross and stupendous frauds, and wilful violations of their official duties, have been perpetrated on the part of various members of the heads of departments and the Common Council, an indictment for which, against individual members has, they have reason to believe, been prevented by their wilful disobedience of the process of the Court, on the part of those absent witnesses. Other witnesses who have been examined, have refused to answer; and the want of a necessary power to enforce the proper answers has been fully felt, and to a certain extent has succeeded in preventing final action in certain cases. Enough, however, has been elicited from the lips, mainly of unwilling witnesses, to warrant the conclusions herein embodied, and to sustain the facts here presented. It is a painful and mortifying reflection that the Grand Inquest of the city and county are compelled, by a regard to their sworn official obligations, and the duty which they owe to their fellow citizens, to present before the community a state of facts affecting the moral and official integrity of high public functionaries, and of startling enormity. They have, however, no alternative—the evidence warrants it, duty enjoins it, and the law commands it.

The investigations of the Grand Jury were mainly directed to charges of alleged malversation in office.

First—The grant of public property, real and personal, to different parties for alleged inadequate and improper considerations.

Second—Charges of direct bribery and corruption on the part of public officers.

Third—Alleged violations of the 19th and 25th sections of the City Charter.

Fourth—Improper and corrupt legislation in regard to certain railroad grants.

Lastly—General and improvident waste and expenditure of public money.

Under the first head, various witnesses were called and examined, the result of whose testimony was, that in the month of December last, a resolution was referred to the Commissioners of the Sinking Fund, directing them to fix a price for certain property, known as the Gansevoort street property. That, after various motions for publication of the proposed sale, and for determining an adequate price by public competition, had been put and lost, the property was finally determined to be sold to Reuben Lovejoy for the sum of $160,000, $40,000 to be paid in cash, and the balance to be secured by a mortgage on the property. That Mr. Lovejoy's proposition was accompanied by a written communication from Mr. Simeon Draper, to the effect that if the grant was confirmed to Mr. Lovejoy, he would take the deed, pay the amount necessary, and execute the mortgage. It further appeared, that on the 27th December, the deed, with a counterpart, was duly executed to and by Mr. Draper, the latter of which is on record in the Comptroller's office, duly acknowledged on the 28th December; that a mortgage was also executed by Mr. Draper, which is on record in the Register's office; and so far, the transaction, independent of the fact that Mr. Draper was one of the Governors of the Almshouse, and by implication embraced within the fourteenth section of the city charter, was closed. It, however, further appeared that another deed of the same property, bearing date the 27th December, and acknowledged on the 30th December, was executed to and for Mr. Varnum—the latter of which is on record in the Comptroller's office—and against the deed executed by Mr. Draper was written in the margin, "Cancelled Dec. —, 1852." This cancellation was proved by Mr. Laurence, a former clerk in the Comptroller's office, to be in his handwriting, and to have been done by direction of the former Corporation Counsel, Henry E. Davies. There was no evidence to show the sanction of the Commissioners of the Sinking Fund to this change and cancellation, and no memorandum on their minutes, of such proceedings. There does not appear to be any mortgage on record from Mr. Varnum; and the only apparent security to the city fund seems to be the mortgage from Mr. Draper, while the conveyance to himself is cancelled, and he has executed a quit claim deed to Mr. Varnum, who would thus seem to enjoy a complete title, free from incumbrance. Evidence was given tending to show that $225,000 would have been given by another applicant, and $300,000 by an applicant who desired the same property, and that notice to that effect was given, previous to the sale, to the Mayor and Comptroller. Without intending to impute any improper motives to the majority of the members of the Sinking Fund, the Grand Jury are authorized to say that there was an undue haste—a want of proper publication, and an apparent want of judgment—in the proceedings and sale, deserving of disapprobation; and that the cancellation of the record was a wanton assumption of power.

It was further proven, that in relation to the sale of the water-right in front of the bulkhead, at or near the foot of Hammond street, the adjacent uplands belonged to Arthur Quinn—that Mr. Quinn, as the party entitled to the pre emption right, was desirous of procuring the grant—that, finding difficulties in the way, he applied to Alderman Sturtevant, of the Third ward, who demanded $2,000 for that purpose—that $1,000 was offered, which was refused, upon the ground that Alderman S. would have to divide, and that there would be nothing left for him, and that Mr. Quinn was obliged to sell, and did sell, his interest in the upland to a third party.

It was further shown before the Grand Jury, that the sum of $500 was paid by Mr. Thomas P. Stanton, to Alderman James M. Bard, of the Fourteenth ward, for and towards the prevention of any interference with certain existing privileges at the pier, south side of Wall street.

It was further proved that in the year 1851, Dr. Cockroft made application for the Catherine street ferry, and after the grant had passed the Board of Aldermen, and was sent to the Board of Assistants, Alderman W. Smith of the Eleventh ward, then an assistant Alderman, received the sum of $500 towards the furthering of a favorable action in the Board of Assistants, upon said grant; and that after the passage of the grant, Dr. Cockroft was called upon by Assistant Alderman W. Smith for $3,000, for effecting the passage of the grant which Doctor Cockroft refused to pay.

It was clearly shown that enormous sums of money have been expended for and towards the procurement of railroad grants in the city, and that towards the decision and procurement of the Eighth avenue railroad grant, a sum so large that would startle the most credulous, was expended; but in consequence of the voluntary absence of important witnesses, the Grand Jury was left without direct testimony of the particular recipients of the different amounts.

In the spring of 1852, a resolution was offered in the Common Council to reduce the fees of the Coroner. Alderman W. Smith called on the Coroner and agreed to suppress the resolution for the sum of $250, to be paid upon receipt of his quarterly report; and the Coroner has paid $200 of said amount. To get a report on the Coroner's bill on the 30th September, Alderman Smith said that Alderman Barr, of the Sixth ward, wanted £100 to report the bill.

Mr. Thomas P. Stanton testified that he paid $500 to Alderman James M. Bard, for the suppression of the report of the leasing of the pier south side of Wall street, in the year 1851.

Doctor Wm. Cockroft testifies that he made application for the Catherine street ferry; and after the grant had passed the Board of Aldermen, and had been sent to the Assistants for concurrence, he was called upon by Assistant Alderman W. Smith, accompanied by ex Assistant Alderman Charles Francis, who stated to him that he could not get a favorable report from the Board of Assistants without paying $500—which he paid. After the passage of the grant, he was called upon, several times by Assistant Alderman Smith, who demanded $3,000, less the discount, for effecting the grant, which he refused to pay.

Mr. George C. Byrne testified that he leased from the Corporation the south half of the pier foot of Jay street. To procure that lease, he said that he had promised to pay a member of the Board of Assistant Aldermen money to procure such grant; he refused to answer to whom.

It is in evidence before the Grand Inquest, that in the lease of a part of pier foot of Jay street, $1,700 was agreed to be paid a member of the Common Council. The individual could not be reached by the refusal of witnesses to answer the questions propounded.

Having examined by committee the public buildings and theatres, we find some of them rather limited in their ingress and egress; the proprietors having been notified, have promised to make such alterations as will obviate this difficulty.

And also a committee to look into the law regulating the building of dwellings, stores, &c.

We find it necessary to call the attention of Fire Wardens and other public officers, to the present mode of building tenant houses. There are in many parts of the city tenant houses, of from five to seven stories high, with only two and a half to three feet entrances, with only one flight of stairs running up in the middle of the house, with from four to six families upon each floor; and if fire should take on the lower floor of the house, the inmates of the upper stories must be subjected to great loss of life, and personal injury.

HENRY ERBEN, Foreman.

THEODORE MARTINE, } Secretaries.
GEO. H. PECK, }

James English, Preston Hitchcock,
William S. Conely, Horatio N. Wild,
Joseph Peck, Jr., John S. Hadley,
John McLean, M. H. Underhill,
J. W. Conklin, John Denham,
W. D. Kennedy, Patrick Garrick,
John M. Griffith, Daniel Hogencamp,
C. V. B. Ostrander.

Mr. Erben, the foreman, said that the Grand Jury wished the Recorder to have the investigation continued by himself, and that he should send for witnesses who had absented themselves from the Grand Jury, and elicit proper information from them.

The Recorder replied that he would do so, and he thanked the Grand Jury for their labor in this matter, and was sure that the community at large would also feel grateful to them. He then discharged the Grand Jury.

The Broadway Railroad and the Grand Jury.

We are requested by a gentleman connected with the Broadway Railroad Association to say:—

That he called last evening on Mr. Henry Erben, the foreman of the grand jury, and inquired of him, first—whether any evidence had appeared, in the investigations of that body, impeaching the honesty of the Broadway Railroad grant, or the integrity of any of the grantees, or of any member of the Common Council, in relation to it; and, secondly, whether any witness, who was stated or supposed to be able to give any testimony in relation to the said grant, had failed to appear when called upon, or had refused to answer when examined.

And that Mr. Erben answered to the first inquiry, that not a jot nor tittle of such proof had been elicited in regard to that grant; that a bushel basketful of letters and charges, with names or anonymous, had been sent to the grand jury, suggesting questions and witnesses to be called on, in relation to various subjects and parties, but that, as regarded the Broadway Railroad grant, they resulted in nothing impeaching the honor or integrity of any body in connection with that case.

And that to the second inquiry, he answered that what was said in the presentment of the grand jury, respecting witnesses failing to attend or to answer, had no application to any witnesses called in reference to that case, the only witness called in reference to it, who did not attend, being Mr. Haight.

THE BROADWAY RAILROAD CASE.

Supreme Court.

ARGUMENT OF EX-CHIEF JUSTICE JONES ON BEHALF OF THE GRANTEES.

Before Judges Edwards, Morris and Strong.

FEB. 23.—*John Milhau and others vs. Jacob Sharp and others.*

This was an action upon a promissory note; but in the course of that cause came up this state of acts: that a certain party had made a voluntary assignment of all his effects for the benefit of creditors, and there was an injunction obtained, on a bill filed against him and the assignees, restraining them from collecting or receiving any of the debts. The question arose upon the validity of that payment, and the injunction enjoined the assignees from receiving or collecting any of the debts. They, however, received this debt after the service of that injunction upon them, and with the full knowledge of the creditors. The opinion was given by Chief Justice Nelson, and he says—"The only question in the case is, whether the payment of the note is to be regarded as having been made by the defendant in his own wrong, by reason of the injunction restraining the payees from collecting or receiving the debts due." Precisely as here, whether we receive this grant or license in our own wrong, by reason of the injunction against granting it, and our knowledge of the existence of that injunction. The Judge goes on to say—"It is a general rule that courts of law will not lend their aid to enforce injunctions from chancery; nor do they ordinarily take any notice of such writs in the course of proceedings in suits at law. The case of Burt vs. Mapes, (1 Hill, 649,) is an authority to show, that, if the payers of the note in question had instituted a suit in this court against the defendant, we should not have received the facts now set up, to avoid the effect of the payment, in bar of the action; and I do not see, therefore, how we can consistently say that payment was not well made. We should have allowed the plaintiffs to go on with the suit, and left the Court of Chancery to deal with them as it saw fit, under the particular circumstances of the case. That court might have excused the act, and overlooked the breach of its process; at all events, we do not assume the office of determining what shall or shall not be the effect or consequences of such a breach of its process. It is enough that the Court of Chancery possesses ample power to punish any unwarrantable interference with a violation of its mandates, and does not need the aid of this court. The aggrieved party has yet an opportunity to reach the assignees, and may be remunerated for all his damages, by the infliction of proper fines, if the case be one which, in the ordinary course of proceedings, and in the exercise of a sound discretion, would be regarded as demanding the interference of the Court of Chancery. In Booth vs. Mott, (1 Salk. 322; 6 Mod. 228, S. C.,) the court set aside an execution which had been issued, after the expiration of a year, without a *scire facias;* and this, though the plaintiff had been tied up by an injunction issued on the defendant's application. The court said they could not take notice of chancery injunctions. In Mitchell v. Cue, (2 Burr, 660,) the judges refused to set aside an execution under like circumstances; not, however, on the ground that the court was bound to notice the injunction, but for the reason that the party should not be allowed to take advantage of his own act in delaying the plaintiff. In Gorton v. Dyson, (1 Brod. and Bing., 219,) the court entertained the argument of a cause, notwithstanding an injunction in the Court of Exchequer against all further proceedings in the C. B. And I observe, also, that in Franklin v. Thomas, (3 Meriv., 234,) it was said to have been the opinion of Lord Thurlow that where an injunction is obtained, even after execution levied, though it is a breach of it for the party to call upon the sheriff to pay over the money, yet, if he voluntarily pay, it is no breach of the injunction to receive it. Lord Eldon thought that in such a case the person receiving the money could be ordered to pay it into court. In the case before us, the defendant was not made a party, nor was he enjoined; and it would seem, from the doctrine of Lord Thurlow, that the payment by the defendant would, even in the Court of Chancery, be a discharge of the debt. Unless we are bound by some settled principle of law to take notice of this injunction, (and I think we are not,) it will certainly lead to a more just and equitable arrangement, in respect to all parties concerned, for the plaintiffs to appeal to the tribunal whose process has been disregarded. It seems that the money has been, in fact, applied in payment of a debt due from Hempsted to Keeler, to whose estate the note belonged, and if the defendant should now be held accountable for the money, this consideration might go to mitigate his loss. Again, possibly the Court of Chancery would be disposed to follow out the idea of Lord Eldon, and call upon the Clinton Bank for the whole or a part of the money. The powers of that court over all the parties concerned in the payment and receipt of the money, upon the note in question, are much more ample and extensive than those possessed by courts at law. In the exercise of those powers, the former court would be enabled to bring out a more full developement of the circumstances connected with the whole matter than can possibly be done here. It might, perhaps, regard the trifling sum for which the note was held by the receiver. Those considerations should induce us to leave the question of a breach of the injunction, and its effect, to the exclusive cognizance of the Court of Chancery. I am of opinion, therefore, as well upon the fitness and propriety of the thing as upon authority, that we cannot take notice of the injunction, and, consequently, that a valid payment of the note was established. The report of the reference must be set aside, costs to abide the event." But I was proceeding to observe, that in this case we apprehend that this injunction, if it was intended to operate, and could by the terms of it operate, if valid, upon the two Boards of the Common Council, if their action upon this resolution was unauthorized, that that court had no jurisdiction to issue it, this proposition rests upon these grounds: that this resolution, then pending before that Common Council, was a legislative act, and that no judicial tribunal had jurisdiction to interfere with the passage of a legislative act before a legislative body. This is, however, another view of that part of it which it may be proper to submit to the Court before particularly considering the one that I have just suggested. The Common Council is a public organized body, invested with particular powers for public purposes. If, in the exercise of those powers, for those purposes, or for any purpose, they exceed their jurisdiction, how are they to be restrained? Is it by writ of injunction from a court of equity? Or is it not by writ of prohibition, in case they are going on, or writ of mandamus, in case they refuse to go on, from the court which has the superintendence in the State of all inferior jurisdictions, except itself, within that State? Is it not, if they transcend their power, or if they act in contravention to their authority, and refuse to do the act which the court may suppose they ought to do, is it not by mandamus from this court of general superintendent jurisdiction to command them to do that act? If, for abuse of power, I ask, can it be possible that a court—that a body invested with legislative power and general discretion—can be called to account by a court of equity, by a writ of injunction, inquiring into their motives and conduct, and impeaching them as guilty of a breach of trust? I believe that you may search the whole records of the English courts of justice, and you will never find such a case. Acts are, therefore, done under the authority of this legislative or discretionary power. Their agents or servants are those who attempt to carry their legislation into effect, and are affected, and may be affected, by injunction from a court of equity; but the passage of the act itself—the exercise of the legislative functions, or the proper exercise of the legal discretion, does not belong to a court of equity to correct or to inquire into; and that subject, so far as it relates to discretion—the Court will remember, embraces powers of all descriptions, whether legislative, judicial, or executive. It embraced the case of President Madison, who was authorized to call out the militia in a certain case; it embraced the case of that very Superior Court assuming to issue its writ of mandamus to the Supreme Court who had granted a new trial in a certain case, ordering them to reverse that new trial and give judgment. The question had been considered, and it went to the court of last resort. It had been said that this has been the practice of the Supreme Court, under their general superintending power, over jurisdiction, from its organization, and their constant practice to interfere in cases of new trial, and to say to the court beneath it: "You have judged wrong, gentlemen; this is not a case for a new trial, and you had no right to grant it." But upon an examination of the whole facts, and an exhibition of authorities before the court, they came to the conclusion that that Supreme Court, invested with all the supreme and superintending powers that it certainly does possess, yet had not that power vested in them. You can send to such a court—say the court of last resort—commanding them to give a judgment, if they refuse to do so, but you cannot direct them what judgment they are to give. That is entirely in their own discretion. That is a thing we are to judge of and not you.

MR. VAN BUREN—Will you please produce some authorities upon this point?

Ex-Chief Justice JONES—With regard to the question put to me by the learned counsel on the opposite side, I can only say, that I have not instituted an examination fully upon the facts, but I have no doubt that such cases do exis, and may readily be found. I recollect perfectly having occasion once to examine that subject somewhat, upon an application made to the court of which I was then a member to restrain or prohibit that court from admitting a certain alderman, who was alleged to have been unduly elected; and upon that occasion counsel of the first eminence at the bar did maintain the proposition, and did offer some pretty strong reasons in favor of the issuing of such writ, when a proper case was made, to such a body of men. I speak now of a corporation exceeding its jurisdiction—going out of its jurisdiction; and the prohibition arose, beyond all doubt, from a higher court to a subordinate judicial tribunal keeping them within their jurisdiction; but whether the writ could be applicable to the case I am not now contending. I contend that an injunction is not a proper remedy, and if there be any it must be some one in the nature of a prohibition by a court having general superintendence of all inferior jurisdiction. My argument is, that no such right exists in any form as restraining a body which acts legislatively from their action in that course of legislation—that they are not to be controlled. Their acts unquestionably are afterwards examinable, for whoever undertakes to execute and carry out the ordinance must see that they had the power, and that they executed that power properly. Even there, how far the mere general averment that the law which they should pass was an abuse of their authority or not, simply when going strictly within the jurisdiction they possessed, would be another and a very grave question. But, beyond all doubt, this Court has a right to look into these acts now before them, and, if they should see proper and sufficient legal grounds to exercise the power, with them rests the power to arrest this proceeding which has been thus licensed by the corporation. Neither this nor the other court has any power to interfere with the legislation of the Common Council—to direct them, "you shall vote or shall not vote in a particular way, or shall not vote at all." It is the act of voting—it is the act of passing the resolution—that I say is beyond the reach of an injunction—and that when the Superior Court, or the judge of that court, issued that injunction, that if it was to have any effect, and to be of any force, it was to act upon the agents of the corporation in prohibiting them from carrying into effect this order, if it were an improper order that that corporation had passed, and not to prevent the corporation from passing it at all. The corporation of the city of New York possess corporate powers, as I understand it, in two capacities, namely: as a public municipal body, and as a private corporation, possessing private property. In one of the opinions delivered in the other court, the general proposition seems to be maintained to this effect: that there is no distinction between corporations, whether they are municipal or whether they are private—whether it is a corporation passing by-laws and resolutions which are to have the effect of legislating for the community for which they act, or whether it is a corporation making a grant of land to me, or any one, or a corporation making regulations for the conduct of a particular branch of business which they are pursuing for their own private emolument. But everywhere, in all cases to which we have referred, (in the language of the counsel and of the judges in cases that have been before this Supreme Court,) in every instance that distinction has been taken, and has been acted upon and followed, namely: the distinction between a public and municipal corporation and a mere private corporation for the regulation of private property—the distinction between them is an obvious one. When the corporation act as a public municipal body they act legislatively, and then no act that the one Common Council can do can bind their successors in regard to any of those public matters or public concerns. In other words, their acts are all revokable, just like an act of the Legislature of the State, passed one day and repealable the next. The Court will find it laid down, in various cases, that the Common Council of the city of New York, in regard to local legislation, possess all the power and supremacy that the legislation of the State possesses in regard to the State at large; and that, consequently, any covenant that they, as a private corporation, may have made, when they come to act in a public capacity as a municipal legislature they have a right to pass an act which shall repeal that private covenant, if the necessities of the city require that that act should be passed, and the Legislature has authorized them to pass it. In their private capacity they were bound by this act; but the Legislature have interfered, and the passage of this by-law by the corporation, under the authority of the Legislature, is just as peremptory and binding upon you as if the law had been passed by the Legislature directly, in itself. It must be so. These local legislative bodies, if they do not possess this power, amount to nothing. If they are constantly to be under the revision of the courts of justice, whenever any disappointed or disaffected citizen shall choose to apply for relief against imaginary injuries inflicted by the by-laws passed by that Board, it will be so fruitful a source of controversy as will alone occupy the Supreme Court in this circuit and in this State. I know it has been said that this supremacy of the local legislature cannot be made available to the Common Council because they are sueable. Well, if the Court please, the corporation of this city, like all other corporations acting in their private capacity, as the owners of land, as the owners of real estate, having franchises which vest in them property, they must be sueable in respect to those properties, and to all their dispositions or contracts made in regard to them. But does it follow, then, if the Court please, that they can be made parties to suits of any kind for the performance of their legislative duties? Can they be sued—the Mayor, Aldermen, and Assistant Aldermen—for passing an act which a person affected by it should choose to say invades his rights? Can you bring an action against the corporation for passing that act? You can undoubtedly sue any person who attempts to enforce that act against you; but can you sue the body who passed it? Is a corporation sueable in that respect? Why, certainly not. They stand upon the same footing as all legislative bodies. They are irresponsible to individuals, because the legislative power was vested in them, and they had this broad legal discretion. A question was asked by the parties who oppose this power "Could you sue the Legislature—could you restrain the legislature?" The answer I give to it is "No," because they cannot be sued. Is that the reason, and does it stand upon that ground, that the State, or the Legislature of the State, is not sueable, because it is a supreme or sovereign body? In one respect the State is not an independent sovereign body, for jurisdiction is given to the courts of the United States which reaches the action of the State itself. If such an action is brought, will an injunction lie against the Legislature of the State upon that particular subject to which that action relates? Look at the case which has been referred to by my associate of the disputed boundary between this State and the State of New Jersey, with respect to the right of fishery upon its borders, the State of New Jersey claiming that they have exclusive rights to certain fisheries which the State of New York has no right to interfere with. If an action was brought in the Supreme Court of the United States for the purpose of trying this right, and the Legislature of the State of New York choose to pass a law authorizing any of its citizens to go and take oysters, notwithstanding this prohibition, would they be restrained by an injunction from the Supreme Court of the United States? No, certainly not. The servant that they send there would be liable to suit, but the act of the Legislature that sends him there could not, as I apprehend, be suspended by injunction from a court of equity. If, then, we are right in this view, that the Common Council, when exercising their legislative power or their legal discretion either the one or the other cannot be enjoined and prevented from acting, the question will be whether this resolution is one of those legislative acts which comes within that protection? Along with this branch of the subject, and as it seems to me in some measure inseparable from it, because partaking of the same character, is the question of discretion. Now, it is admitted by the learned judge who gave an opinion in the other court, that discretionary power, let it be vested where it will, whether in a legislature, in a judge, or in a commissioner cannot be either controlled or interfered with. He put some exceptions, it is true; but the general proposition was admitted. Now, is not the grant of this license to lay rails in Broadway emphatically an act within the discretion of the Common Council? Is not the very act that they do in respect to the regulation, management, and use of the streets, not as vesting in their discretion? Application is made to the Common Council to erect a signal pole in a street. None but the Common Council can grant it. Every citizen concurring would not confer that right upon a person. They may grant this or they may not. They inquire into the reasons for or against it, and in the exercise of that discretion they make the grant. Now, is not this, in every sense of the word, a discretionary power. In a recent case the corporation granted the permission to a person to erect telegraph poles upon his application. Now what, if the Court please, is the difference between this resolution, permitting a certain person to erect telegraph poles in the Ninth avenue, and the resolution that "Jacob Sharp and his associates be authorized and allowed," &c.? Are they not equivalent expressions, giving to the party thus applying a license which the party giving had a right to give? What is permission but authorizing? What is license but permission? Now, this body, this Common Council, which is the only body who could do that act within the jurisdiction of this city, in passing upon it, I ask, do not they act legislatively, and do not they act in the exercise of a discretionary power? Indeed, is not every law, to the extent to which that law goes, the exercise of a discretion? Now, while the learned Judge admitted that you could not interfere with a party who had discretionary power to act or not "to act," he said: "and this must be taken under restrictions and with exceptions." Why, if the Court please, let me ask, does not this destroy the discretion wholly? Who is to judge whether these exceptions apply or not? Who is to prescribe the limits of this discretion, or the due and proper exercise of it? Is it not in the very nature of a discretionary power, that the party who is to exercise it must be the judge of its expediency, its necessity, and its propriety? "I can interfere," says the Judge, "if you have discretionary power, if you go out of that discretion." Is this so? If it be, then it is the judging power that is to regulate this discretion, and that discretion is with him. He exercises that discretion, and not the party to whom it is ostensibly given. So with the case of abuse. If another party is authorized to say when, and where, and how that discretion is abused, it is not that party who has this superintending power, this judgment upon the discretion of the other, that is vested with discretion; and the man to whom it is given is nothing more than a mere agent, to exercise that discretion, or that power, just as far as his superior tells him he must do, and just as far as his superior directs him, and to avoid just whatever that superior should adjudge to be abuse. But, it is said, that this act of the corporation, giving this license, is making a grant. Now, what is a grant? As far as we have used the expression, the use of it explains it. It is the grant of a license. It is the grant of a permission. Well, if the Court please, the word "grant" there has the same meaning with the word "give." A person applies to me for liberty to use room in my house for a particular purpose—to entertain a friend, if you please, or anything else—and I give him permission, and in giving that I say "grant you leave"—is that any more than permission for him to use that room in my house. Now, if I should choose to tell him that I repent of having given him the room, and say "you shall no use it," cannot I revoke it just as well by using the word "grant," as the word "give?" If I understand the word "grant," in the sense these gentlemen would apply it, it must be the passing of some right or interest in the party to whom it is given for a consideration, and which will benefit the grantors and be irrevocable. Is there any such feature in this act of the Corporation? Have they conferred upon these parties a grant which they cannot revoke? Have they given them a lease for a term of years of Broadway for the purpose of running a railroad? Why, that corporation perfectly well understood that they had no such power. They perfectly well understood that they had no such intention. They were vested, not with a fee simple of that street which they could dispose of at pleasure, but they were trustees, as we say, vested with the legal estate for the purposes of that trust, but still trustees, without any power over it than that of regulating, ordering, and prescribing the uses which should be made of it, and thus to be in conformity with the purposes for which this street was originally seized or purchased. Now, then, in connection, generally, it will be to be considered, first, whether this resolution which was passed, conferred, or attempted to confer, any such rights, and, secondly, what the powers of the corporation were in respect to them, and in regard to the continuance or discontinuance of whatever they may have granted to these individuals. Certainly the terms of the resolution do not import a grant of any right or interest in that street; it is simply to lay down rails upon it for specific purposes. If those purposes were not in conformity with the uses for which that street was originally designed, and to which it has been uniformly used, why, then, will it be admitted that it is a void grant? They could not make it, and nobody would be bound by it: but if the purposes for which these rails were to be laid down are in pursuance of the purposes to which that street was originally devoted, then they are strictly legal, and no one can complain of them, or attempt to revoke them. Now, in the first place, we say that here has been no grant of anything save this license, and that it confers upon the grantee of the license nothing more than the privilege, the consent of the corporation, to lay down these rails in Broadway, provided that in other respects the laying down of those rails in that street would be consistent with the use of the street for the purposes of travel. In that respect, and to the extent that that use of them is thus justified, and thus in conformity with the uses and purposes of the street, the license is a valid one, and so long as they like to continue it no one can interfere with the party to whom that license is given; but it remains in the breast of the corporation to revoke it whenever they please, and for any future corporation to do the like. The very object for which the license was given on the face of it shows that it is for the purpose of travel. It is for the purpose of introducing and bringing into use a new mode of using this street for the purposes for which it was originally laid out. Now, one objection which has been made on the part of our opponents is, that this is a new use of the street, and for that reason the corporation has no right to grant it. The cases that I have read to the Court upon that subject are, I am convinced, conclusive. It is a new mode of travel—it is a new mode of using the street—still it is a mode of using it for those purposes, and for none other. Shall we be told that these proprietors, whatever rights they may have, are entitled to have this street continued precisely as it was when it was first laid out, and to be used by carriages, and in the modes in which streets were then used, and no other? Are all improvements in the mode of travel to be excluded? But originally the streets were pitched and paved, and having but one single gutter in the centre of the street. Will it be contended for a moment that that mode of using the street should be forever continued? In the first introduction of vehicles into the streets of the city, probably carriages of a different description from those that were afterwards introduced were employed. Suppose a coach or a carriage upon a new principle or a new plan, having broader wheels, if you please, and moved by a different power, should be introduced into the street, would that be a reason why a license should not be given to those carriages to be used in that street? Where is the difference, except in a single circumstance, that the present use of the cars require that there should be some modifications in the surface of the street, to admit of the laying down of the rails upon which they are to move? And as to that it has been proved over and over again, that this change in the surface of the street, and the mode of propelling the cars, makes no difference, and does not prevent the exercise of the power of the Corporation to admit the use of the street in that way. My associate counsel refers me to several acts of the Legislature, showing that in exercising their legislative powers they are in the constant habit of making grants, legislatively, of different privileges to different persons, as they shall deem proper and expedient, and right, consistent with the interests of the State. There is one, for instance, authorizing certain persons to carry out vaults in the Seventh ward of the city of Brooklyn; and, besides this, there are many of a similar character. But, if the Court please, it is hardly necessary to refer to that species of legislation, because the statute books are full of them. Legislative acts granting property and authorizing certain acts to be done are perpetual occurrences. It was said, however, as another objection to this resolution, that if it was competent for the Corporation to pass it, it was a subject of proper reference to one of the departments. It was a contract, and therefore came under the provisions of the amended charter, which refers the powers of making contracts, or rather the act of making contracts, to the Street Department. Now, if the Court please, the same answer which has been given to several of the propositions upon the other side, apply to this. This resolution is not a contract. It has no form or feature of a contract about it. The corporation acquires no rights by this contract, as a body, for their private benefit. This license fee is a fee authorized by the statute of the State, and not by the corporation of the city. They give no fee in the resolution that they pass. That is regulated by the Legislature of the State, and intended merely for the purpose of defraying any expense that the city might be put to, or any inconvenience that the city, as such, might suffer from the use of this license. The corporation, as a private corporation, gain nothing by the construction of this railroad. As a public body, in their public capacity, they could make no contract that was not revocable by their successors and by themselves, because they could do nothing but pass a public resolution and a public law. It is in reference to their private property that they enter into and make those contracts which are binding upon them, and there they stand upon the same footing with any individual. In that case they contract. There they give a benefit for which they receive a compensation; but in their public acts they pass them for the general good of the public, upon public considerations, and they can receive no benefit from them. To this point it was that the corporation counsel gave his opinion that this local legislature could receive no benefit, that they could make no sale—they could make no binding contract to receive a hundred thousand dollars, for which this privilege of laying down the rails was to be continued to them for one entire year. And further, he very rightfully advised the corportion that they had no power to receive such a consideration, because they had no power to make any grant for which that compensation would be an equivalent. They could do nothing but pass legislative acts, and it was upon that ground, as I understand, that the market case was decided, as well as the street cleaning case. In the street cleaning case, the corporation undertook, mistaking their powers, to make a contract with a certain individual for cleansing the streets, for which they were to pay that individual a specific sum of money, to continue for five or seven years, or, at all events, for some considerable time; and the moment that contract was impeached it was declared by the courts before whom it came to be utterly void—that it was an attempt to bind their successors by these acts of legislation. It was an attempt to make a contract for the cleansing of the streets under those various powers, to which I have referred, in the charter, vesting them with the entire power and control over the streets, and to direct and order them, they could not, under such a power, grant the right to cleanse these streets for a specific sum, or make a binding contract upon them that should endure for three or four years; and, therefore, it was held, that that was a void act, and consequently that the grantee under it had no power to enforce it against the corporation. So here, if this Common Council had attempted to contract with these parties, that they should have a right to continue that railroad there for five or ten years, the next Common Council could have rescinded the act altogether, and revoked their consent. Suppose, now, that the Legislature passed an act not within their jurisdiction, which would violate private rights, it is void; but you cannot forbid that Legislature from passing it. You act upon the agents who attempt to avail themselves of it or carry it into effect. In that view every benefit is derived to the party, without the inconvenient power, if it did exist, of the courts interfering with the legislation of the city, or with the discretionary power of the parties intrusted with the power to act. That would seem to be a perfect answer to the objection that this license has been granted by the corporation itself, without any reference whatever to the Street Department; but, if the court please, by looking at the provisions upon that matter, I think it will be most apparent that this was a case which did not come within that provision of the charter. The provisions of the charter, in this respect, I will for a moment direct the attention of the court to. There are two parts of the amended charter to which the court have been referred. It will be observed that one great object of this amended charter, was to prevent what had been considered up to that time an improper exercise of power, or authority, or jurisdiction by the different Aldermen of the city, in making contracts each within his own jurisdiction, and the disposing of them, or having the patronage of these different contracts at his own disposal, and many evils were apprehended to, and probably did arise from that circumstance. Therefore, in this amended charter there was a distribution made of the executive and legislative functions. The Legislature vested the whole legislation in the Common Council of the city, and it then went on to create departments for the administration of the executive powers, and among others it conferred upon the Street Commissioner particularly, the power of making all contracts of a certain description. Now, we will presently show what these contrasts were. And first as to the executive power:—"The executive power of the corporation shall be vested in the Mayor, the heads of departments, and such other executive officers as shall be from time to time created by law, and neither the Common Council, nor any committee or member thereof, shall perform any executive business whatever, except such as is or shall be specially imposed upon them by the laws of the State, and except that the Board of Aldermen may approve or reject the nominations made to them, as hereinafter provided." They shall not exercise executive power. And the other clause in the amended charter is, that "all contracts to be made or let by authority of the Common Council, for work to be done or supplies to be furnished, and all sales of personal property in the custody of the several departments or bureaux, shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances of the Common Council. Every person elected or appointed to any office under the city government, shall take and subscribe an oath or affirmation before the Mayor, faithfully to perform the duties of his office, which oath or affirmation shall be filed in the Mayor's office." Now, then, in the first place, the Common Council, as such, or any member of it, is precluded from the exercise of these executive powers which are indicated by these charters. All the powers given to the different officers they are restrained from exercising. They have exerted no such power here. They have passed a resolution in their legislative capacity, permitting a railroad to be laid in Broadway, but they refer most especially in the conditions which follow that resolution—and I believe in the resolution itself—to the Street Commissioner as the person under whose direction the executive part of the matter is to be performed, the laying down the rails, the men doing it, and so forth. It is to be done under his superintendence, and the general orders which they give upon the subject, and they refer especially to the Mayor as the person who is to give the license which these parties are to have by the laws of the State. The only question that remains upon that branch of the subject is, was this a contract within the twenty-third section of this amended act? The terms of that section are: "All contracts to be made or let by authority of the Common Council, for work to be done, or supplies to be furnished." What work was to be done here that comes within the meaning of this section? This—rails were to be laid. Was that work to be done, or supplies furnished, by the corporation? Were they to be remunerated for that work? It seems to me that the meaning of the section is too plain possibly to be mistaken. It referred to all that numerous classes of contracts which are made by the corporation for the performance of the various work which they have to transact throughout this immense city, among which are all the operations upon the streets which are made at the public expense—all the supplies to be furnished for their use in all directions. Those are the contracts that come within the meaning of that resolution. Here is a mere license to a company to lay a railroad in a public street, at their own expense, and without any reference to the corporation, or any contract with them upon the subject whatever. It neither comes within the letter or spirit of that act, which was to restrain the corporation as such, from participating in any way, in benefit or profit, from those contracts which were made for the public and the public use. Could this matter be referred to the Street Commissioner? Had he any right to make a license or give a grant? None at all. It was no power in the corporation that could authorize, or could allow, or license the laying down of that railroad in Broadway, but the corporation itself, by its legislative act. They could not refer it to the Street Commissioner. It was not a subject of contract, or of grant, which could come under the provisions of that charter. They could not advertise for proposals for doing this, because they could not by possibility receive remuneration. It could not be set up at auction; it could not be disposed of by saying who were the highest bidders for this property. It was necessarily to be done by the corporation itself, in the exercise of its sound discretion, and by its legislative act. In the case of Christopher against the Corporation, there the work to be done, and about which the contract was made, was on the private account of the corporation for the building of a new market. Now, there the work was to be done for the corporation, and the Court will perceive, by looking at the case, that the corporation did in that case attempt to proceed under that section. The Board of Aldermen first passed a resolution that the market should be built, and then ordered that some advertisement should be made. All these acts were under that twenty-third section of the charter; but they were not carried out, and when the question came before the court, the court said, "you have not done what that section requires," and they put it expressly upon the ground that this was a contract for public work which the corporation had no power to make, and which no one could make under that charter but the Street Commissioner, and it was upon that ground that that case was decided. And, as it appears to me, in that view of it, it was correctly decided. There the act to be done was the taking down of the Washington Market, and the erection of a new market, I believe, upon a larger scale, in its place. The contract was made by the Common Council themselves, directly, and not in pursuance of this section of the charter, and the court said, "When you made that contract, it was one that came directly within the scope of this twenty-first section, and you were bound to apply the directions given by that section of the charter. You have not done so, and consequently your act is void, and the contractor cannot succeed in his action upon that contract." But, it is said that the corporation cannot authorize this railroad without making compensation to the owners of the land for the portion of the street that it was to occupy. Well, it seems to me, if the Court please, that the answer to be given to that is one that was given in one of the cases to which I have referred the court, namely, that here was no land taken. The corporation did no more than authorize the use of this street for one of the purposes for which it was originally designed. They did no more than to authorize the use of the railroad in that street for the purpose of conveying passengers. They did not take any part of the street. They vested no right in the title of that street in the grantees of this license. If, therefore, the parties proved to this court, in the most extensive terms, that the fee of this street vested in them for public purposes, they would have made no advance whatever in the proposition they now set out with, that they were entitled to compensation for taking that ground for the use of this railroad, for the reason that the street is used for no other purpose, upon their own admission, than to which they themselves dedicate it. That then offers the proposition before the court, upon the authority of these cases, that this is a legitimate use of that street. And that the laying down of this railroad in that street appropriated it, or applied it, to any new use to which it was not applicable by the terms of the cession or dedication of it. Upon that question courts have passed over and over again, and it appears to me that nothing can be plainer, or, where no case in which the application of the principles of the constitution, that no man's property shall be taken without just compensation, could be applied to this case. The property had already been dedicated for this public use, and it was attempted to be used for no other purpose. But it is further said that this railroad is a nuisance, and that upon that ground this court ought to interfere, even although all other reasons fail. Now, if the Court please, as to that question, there is certainly not sufficient information before the Court for them to pronounce judgment upon it. It is admitted, because the courts have expressly so decided, that a railroad, *per se*, is not a nuisance. What extraneous circumstances, what matters in connection with the railroad, are put before this Court to show that this particular railroad is a nuisance? The parties have said, in reference to this particular charge—and, as far as I could see, it could refer to no other—first, that Broadway is too narrow for a railroad; secondly, that the business occupied in it and for which it is destined to be occupied for years, if not forever hereafter, renders the existence of a railroad incompatible with the interests and proper pursuits of those engaged in that business. These are all the reasons, all the suggestions, that are made in this bill that tend even to show that this railroad could, by any possibility be denominated a nuisance. Now, if the Court please, what have they shown upon the subject of the dimensions of this street, in the first place? Broadway is said to be of the average width of about forty feet in some places, and a little under and a little over in other places. Now, take this proposition by itself. Is a carriageway of forty feet too narrow to admit of a railroad in the centre of it occupying twelve and a half feet?—for that is the whole extent that will be occupied. Now, upon this question there are conflicting statements as to the effect of a railroad in a street of that width; but let me ask this question of the Court, whether the railroads the corporation have authorized in other streets do not pass through streets narrower than that of Broadway. The Sixth and Eighth avenue railroads, both of them, from the termination of those avenues to Canal street, pass through streets much narrower than Broadway. The railroad in Broadway leaves you, upon each side of this space in the centre occupied by these rails, a space of from thirteen to fourteen feet. Now, if the Court please, before the widening of some of the streets in the lower part of the city—and many of the entire streets were of less dimensions, including the carriageway between the sidewalk upon each side, and William street in particular—yet all the purposes of business, and it was always a business part of the city, is carried on in those streets; and by the calculations and estimates that these parties have made upon the subject, it is fully shown that there is an entire practicability of carrying on all the business of that street, even supposing that carts and carriages using it should not occupy any part of this surface occupied by these rails. But it is perfectly clear, and seen every day in the streets in which railroads are used, that other carriages that travel these constantly occupy the middle of the streets, as well as other parts of it, and are constantly in the habit of crossing and passing upon the rails themselves. There is no obstruction created to the passage of other carriages, either along the street or across it. But, if the Court please, if this be an objection, I ask, when and how are you to have a railroad in the city at all? Broadway, with the exception of the avenues and Broad street, is the widest street in the city. If you cannot have a railroad in that street because it is too narrow you cannot have a railroad at all.

[To be concluded to-morrow.]

The New York University.

A meeting of gentlemen interested in the cause of liberal education in this city, was held in the chapel of the University, last Friday evening, pursuant to a call of the Rev. Dr. Ferris, Chancellor of the institution. The immediate object of the reverend gentleman was to submit some facts and results concerning its progress since the foundation, and to disabuse the mind of the public, and particularly the minds of our *literati* and younger students, of the idea that its affairs were clouded in inextricable difficulty. At half-past 7 o'clock there were a number of clergymen and members of the learned and mercantile professions present, amongst whom we noticed the Rev. Drs. Bethune, Cheever, Phillips, Asa D. Smith, Hutton, Van Arsdale and Krebbs, Professors Webster, Dougherty and Greene, Myndert Van Schaick, William Curtis Noyes and George Griswold, Esqrs., with a great number of students.

Upon motion of the Rev. Dr. Ferris, George Griswold, Esq., was called to the Chair, and the Rev. Mr. Macauly acted as Secretary to the meeting. The Rev. Dr. Phillips made a prayer prior to the commencement of the proceedings.

The Rev. Dr. FERRIS said:—Sir, this meeting has been called together by a circular letter, which I will take the liberty of reading. The Chancellor here read the letter to which he referred—and continued, This circular is signed by myself, and, in compliance with the promise contained in it, I beg to occupy the attention of the meeting with some remarks upon the working of this institution, its difficulties, its exertions in the cause of education, and its present prospects. It gives me pleasure, sir, to see such a meeting as this, as it evinces that an interest is felt for the welfare of an University which is, emphatically, the institution of New York, as far as the intellectual developement, and the training of the moral feeling of her people into a proper course, are concerned. The accomplishment of this has ever been the aim and object of its Professors, convinced as they were, and are, that if public teachers give all their attention to the former and neglect the latter result they put into the hands of frail humanity a dreadful weapon. The city of New York has done many noble things in the carrying out of literary objects. The founding of this University was one of her greatest and best efforts. It was chartered for the people, and has continued devoted to their interests to the present day. Its foundation was urged by the most excellent men, among whom I may mention the name of the Reverend Dr. Millner, who watched over its rise with an anxiety which I hope to see renewed among us. The University was incorporated by charter in the year of 1831, and opened at Clinton Hall, in 1832. The first class assembled in 1833, and the foundation of this building was laid in July of the same year. The halls were opened for the purposes of public instruction in the year of 1836. Since then it has had a checkered history, and has been encompassed with many and frowning difficulties. It has been sadly oppressed with debt, and this indebtedness has left an impression correspondingly sad with regard to its prospects upon the public mind. It is viewed through the dark clouds of difficulty, and the question now is, if they were dispelled could it fulfil its object? In speaking of the interior working of the University, in a scholastic point of view, I may be permitted to say, with truth, that its course of teaching is practical, liberal, and elevated; and if you compare it strictly with that of kindred institutions which enjoy a high reputation, you will find that none stand upon a better footing in that respect than the University of New York. The humanities are attended to in the fullest sense; and we do not confine our instruction to the imparting a knowledge of the dead languages alone. We teach so as to fully fit the rising youth for the professional, mercantile, engineering, or mathematical departments of life; and our Faculty of Professors are men of ability, men of scholar-like attainments, men who kept this foundation open, by large pecuniary sacrifices, when it groaned beneath the weight of crushing difficulties. I need only mention the names of Professors Draper, Johnston, and Loomis—the latter in our mathematical department, and the author of a series of works which have taken the highest place amongst books of that character. Mr. Crosby, who has recently come amongst us, has already won golden opinions for himself. Under the guidance of such men, the University has already done a precious work for the people, for it is an error to suppose it an aristocratic institution. If the sons of rich men are here, so also are the sons of the poor man, and no youth has been ever turned away because he was penniless. If he had patience, talent, and a holy desire for instruction, money has been to us a secondary object, and our scholarships have been ever occupied by men who had merit and were struggling with difficulty. The lad who, some years since, sat upon a shoemaker's bench in Williamsburg, entered here with the fire of educational zeal in his heart, mastered Latin and Greek, under Professor Owen, obtained a scholarship, and was sent forth a glorious minister of God. Amidst the mountains and rocks of Schoharie county he now draws many souls to Christ. We have had a delightful succession of such cases, for, out of four hundred and fifty graduates of the University, nearly one-half have been educated gratuitously. Although I freely bear my testimony to the merit of that noble institution in Twenty-third street—the Free Academy—I must say that we have an advantage in this respect. They are limited to a certain class of students, taken from the public or ward schools—our doors are open to all. If I turn to our evangelical working, I may assert that we stand upon a basis of religion equal to that of the most cherished of the New England institutions. We have a large infusion of religious instruction and personal piety, without being sectarian or polemical. What contributions have we made to the Church of Christ? The ministry has received a remarkable addition to its numbers from this University. Comparing the number of *alumni* with other graduates, I find that one in every three and seven-tenths have devoted themselves to the gospel ministry. This places us by the side of the most favored institutions in this respect. The proportion of clergymen to *alumni* is—at Yale, one in three and eight-tenths; at Dartmouth, one in three and nine-tenths; and at the college in New Jersey, one in five and three-tenths. The number of eminent medical men who have graduated here and gone forth from our walls have attracted universal attention to us from every quarter. The Faculties of Law and of Arts and Design have not been carried out, owing to our pecuniary difficulties. Remove these, and the way is open to accomplish the best wishes of the founders of the institution. I have now, sir, pointed attention to our objects, embarrassments, and works, as I intended, and the meeting will be addressed by some gentlemen who will express public opinion perhaps more correctly than I can.

The CHAIRMAN called upon the Rev. Dr. BETHUNE.

The Reverend Doctor said:—I should not attempt to present myself to the meeting were it not for the pressing call made upon me from the Chair. Not that I do not feel a deep interest in the affairs of the University, but it is scarcely my place to speak upon them. In the first place, I am not a resident of New York, but live in that place which Bishop Hughes contemptuously designates a suburban village. (Laughter.) In the next, although born and bred a New Yorker, so large a portion of my life has been passed out of it that I am not familiar with the history of the city, much less with that of this institu-